

The Notice also seeks comment on the interplay between the terms "services," "facilities," "information" and "goods" as the terms are used in Sections 272 and 251(c) (which enumerates incumbent local exchange carriers' interconnection and resale obligations to new local exchange entrants). The Commission suggests that clarifying or defining these terms might enable competitors to more easily detect violations of Section 272.⁵⁸ ITAA respectfully disagrees. To define these terms now is not only unnecessary, but likely to limit the Act's otherwise unqualified nondiscrimination requirement. As long as the Commission makes clear that in enforcing the nondiscrimination requirement of Section 272(c) the Commission will broadly construe these terms to prevent any access discrimination and cross-subsidization, further explication of these terms is unnecessary.

For similar reasons, the Commission need not consider: (1) whether the Computer III nondiscrimination safeguards are sufficient to implement Section 272(c)(1); (2) whether to prescribe procurement procedures; or (3) whether to adopt procedures to ensure that the BOCs do not discriminate in the establishment of standards.⁵⁹ The language of Section 272(c)(1) is, as the Commission notes, absolute.⁶⁰ The Commission need do no more than confirm that fact and put the BOCs and their competitors on notice that any discrimination whatsoever will violate the Act.⁶¹

⁵⁸ See Notice at ¶ 67.

⁵⁹ See id. at ¶¶ 75-78.

⁶⁰ See id. at ¶ 72.

⁶¹ To the extent that a BOC seeks certainty regarding the lawfulness of its activities, it should request a declaratory ruling addressing its specific concerns.

The Notice also suggests that the BOCs might seek to avoid the provisions of Section 272 by transferring their local exchange network capabilities and facilities to their separate affiliates.⁶² Their presumed incentive for doing so would be to escape the requirements of Sections 272(c) and 272(e), which arguably do not apply to BOC affiliates other than those required by these provisions. To prevent such a possibility, the Notice proposes, and ITAA supports, a prohibition against the transfer of network capabilities to a competitive affiliate. ITAA also concurs in the Commission's analysis that, if a BOC were to do so, its competitive affiliate would become a successor to the BOC within the meaning of the Act and thus subject to all of the provisions of Section 272, including but not limited to Section 272(c)'s requirement to make network facilities available on a nondiscriminatory basis.⁶³

IX. THE NONDISCRIMINATION REQUIREMENTS OF SECTION 272(e) SHOULD BE CONSTRUED BROADLY AND IMPLEMENTED TO GIVE THEM FULL EFFECT(¶¶ 81-89)

Section 272(e) lists four nondiscrimination requirements. These requirements are largely self-executing. To ensure that the pro-competitive goals of Section 272 are

⁶² See Notice at ¶¶ 70 & 79.

⁶³ See 47 U.S.C. § 153(4)(B) (defining a "BOC"). The Commission also inquires whether nondiscrimination safeguards other than those specified in the Act should be imposed on BOC-affiliated information service providers. See Notice at ¶ 71. As an initial matter, it should be noted that no such requirement should be necessary if the Commission effectively implements and enforces Section 272. Moreover, it is doubtful that the Commission has authority to impose such a requirement on any information service provider, acting as an information service provider, whether BOC-affiliated or not. See GTE Service Corp. v. FCC, 474 F.2d 724, 732-36 (2d. Cir. 1973).

served, the Commission need only confirm that it will construe these requirements broadly and enforce them vigorously.

Section 272(e)(1) requires that each BOC fulfill requests by unaffiliated third-parties for telephone exchange service and exchange access in the same period of time in which the BOC provides such service to itself or an affiliate. The Notice asks how broadly to interpret the term "request."⁶⁴ To comply with Section 272(e)(1), the BOCs must fulfill all requests for exchange service and exchange access -- whether for installation, upgrades or repairs -- on a nondiscriminatory basis. The statute makes no exceptions; neither should the Commission. To ensure compliance, the BOCs should be required to report periodically on their service performance in a manner that demonstrates that non-affiliates are not facing discriminatory treatment.⁶⁵

Section 272(e)(2) requires each BOC to provide facilities, services and information about its provision of exchange access to separated affiliates and "other providers of interLATA services in that same market" on the same terms and conditions. Similarly, Section 272(e)(4) states that, when a BOC provides an interLATA affiliate services and facilities, it must both provide those services and facilities to "all carriers at the same rates and on the same terms and conditions" and it must do so in accordance with appropriate cost allocations.⁶⁶ The Notice inquires as to what "other providers of interLATA services" are

⁶⁴ See Notice at ¶ 85

⁶⁵ See id.

⁶⁶ 47 U.S.C. §§ 272(e)(2) & (e)(4).

covered by the requirements contained in Section 272(e)(2).⁶⁷ The Notice also asks whether information service providers are covered by the nondiscrimination requirement contained in Section 272(e)(4) which, by its terms, bars only discrimination against "carriers."⁶⁸

The language of Section 272(e) is obviously ambiguous. The reference to "other providers of interLATA services" in Section 272(e)(2) appears to bar discrimination against providers of information service -- although, as noted previously, the Telecommunications Act elsewhere defines the term "intraLATA services" to apply to "telecommunications" services.⁶⁹ Even Section 272(e)(4), which could be read as referring only to carriers, precludes discrimination in favor of the BOCs' "interLATA affiliate" without distinguishing between the provision of interLATA telecommunications and information services. Further ambiguity is created by Section 272(f)(2). This provision clearly states that the four-year sunset period governing regulations applicable to BOC provision of information services does not apply to the rules specified in Section 272(e) -- suggesting that the provisions of Section 272(e) do apply to information services.⁷⁰

Given the ambiguity on the face of the statute, the Commission has no alternative but to construe these provisions in the manner that will best achieve the intent of

⁶⁷ See Notice at ¶ 85.

⁶⁸ See id. at ¶ 89.

⁶⁹ See 47 U.S.C. § 153(21).

⁷⁰ See 47 U.S.C. § 272(f)(2).

Congress.⁷¹ To do so, the Commission should interpret Sections 272(e)(2) and 272(e)(4) as prohibiting discrimination against non-affiliated information service providers, as well as against non-affiliated telecommunications service providers.

The purpose of Section 272 is to prevent the BOCs from harming competition in any of the competitive markets that they are to enter. A construction of Sections 272(e)(2) and 272(e)(4) that reads these provisions as barring discrimination against non-affiliated telecommunications providers, while allowing discrimination against non-affiliated information service providers, would be plainly inconsistent with the legislative intent. Doing so also would effectively read Section 272(f)(2) out of the statute. The Commission should reject any proposal that it do so.

Even if Sections 272(e)(2) and (e)(4) did not authorize the Commission to bar the enumerated forms of discrimination against non-affiliated information service providers, Section 272(f)(3) makes clear that the Commission retains authority -- under Section 202 and other provisions of the Act -- to "prescribe safeguards" specifically barring these forms of discrimination.⁷² Thus, Sections 272(e)(2) and (e)(4) should be read as imposing permanent obligations on the BOCs not to discriminate between their interLATA affiliates and non-affiliates -- whether telecommunications or information service providers -- in the provision of facilities and services.

⁷¹ See 2A N. Singer, Sutherland on Statutory Construction § 45.13 (5th ed. 1992) (statute should be construed in conformity with its spirit, giving effect to what was evident intent of legislature).

⁷² See 47 U.S.C. § 272(f)(3); see also 47 U.S.C. § 202.

Section 272(e)(3) requires that each BOC assess its separate affiliate for any exchange or exchange access service provided to the separate affiliate "charges no less than the amount charged to any unaffiliated interexchange carriers for such service."⁷³ To the extent that non-affiliated interexchange carriers obtain such access under tariff, separate affiliates should be required to take these services at tariff. To the extent that these services are made available pursuant to non-affiliates by agreement, the separate affiliates should be required to obtain these services on terms that are no more favorable than those contained in the agreements.

Equally important, the Commission should make clear that the BOCs' information service operations must continue to obtain basic transmission services from the BOCs at the same, publicly available and nondiscriminatory rates as unaffiliated information service providers. Although Section 272(e)(3) -- like the provisions previously discussed -- expressly addresses only discrimination between an "affiliate described in [Section 272(a)]" and "unaffiliated interexchange carriers,"⁷⁴ the Commission should effectuate Congress' intent by requiring that each BOC charge its information services operations prices no less than it charges a non-affiliated information services provider for services or facilities used in the provision of information services.

This reading is consistent with the Commission's current, appropriate practice. By requiring BOCs to provide and to take local exchange services at nondiscriminatory rates, the Commission will continue to limit the ability of local exchange carriers to favor their

⁷³ See 47 U.S.C. § 272(e)(3).

⁷⁴ See 47 U.S.C. § 272(e)(3).

information service operations to the disadvantage of non-carrier information service providers. As discussed more fully below, given the limited options that non-carrier information service providers will continue to have for acquiring basic transmission services, this safeguard will remain necessary for the foreseeable future.

X. THE COMMISSION SHOULD REQUIRE THE BOCs TO SUBMIT PLANS, SUBJECT TO PUBLIC REVIEW AND COMMISSION APPROVAL, DEMONSTRATING THEIR COMPLIANCE WITH THE PROVISIONS OF SECTION 272 (¶¶ 94-107)

Ensuring compliance with Section 272 will be critical to effective implementation of the Act. The Notice, however, evidences some apprehension about creating burdens for the BOCs.⁷⁵ Although unnecessary regulatory burdens should be avoided, the Commission needs to be satisfied that the BOCs are conducting their interLATA service activities consistent with the requirements of Section 272.

The Commission therefore should require the BOCs to submit compliance plans, as it did in Computer II, demonstrating their compliance with the structural separation and nondiscrimination provisions of Section 272.⁷⁶ The BOCs also should be required to

⁷⁵ See Notice at ¶ 95.

⁷⁶ Under the Computer II rules, AT&T (and subsequently the BOCs) were required to file "capitalization plans" prior to their formation of separate enhanced services affiliates. The Commission required the BOCs' plans to include "information as to the amount and type of assets and personnel each [BOC] will transfer to its separate organization to support its first year of operations; the operational plans which they will institute to ensure compliance with the Computer II rules; and the timetable for full compliance with the Computer II rules. . . ." Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, 95 F.C.C.2d 1117, 1146 (1983) (subsequent history omitted). The Commission should require the BOCs to provide comparable plans describing their capitalization of their "Section 272

submit periodic reports regarding their implementation of those plans, similar to those required by the Commission's ONA and CEI rules.⁷⁷ In addition to demonstrating compliance with Section 272, these plans and reports should address how and where the BOCs have made public information regarding transactions in goods, services and facilities with their affiliates.⁷⁸ Moreover, to facilitate enforcement of the Act -- especially given the 90-day statutory period for resolving complaints -- the burden of proof in such complaint proceedings should shift to the BOC once the complainant has made a prima facie showing that the BOC has failed to meet any of the requirements of Section 272.⁷⁹

XI. THE BOCS MUST CONTINUE TO ABIDE BY THE COMMISSION'S NO-BUNDLING, ALL-CARRIER AND TRANSMISSION-AT-TARIFF RULES (¶¶ 108-152)

The Notice seeks comment on whether the BOCs' interLATA telecommunications affiliates should be classified as non-dominant and, if so, what the implications of this classification are.⁸⁰ Regardless of how the Commission classifies these separate affiliates, the BOCs should be required to comply with three basic "rules of the road" that are applicable to all carriers -- both dominant and non-dominant. Those rules are the No-Bundling Rule, the All-Carrier Rule and the Transmission-at-Tariff requirement.

affiliates" and what they will do to ensure compliance with Section 272.

⁷⁷ See Notice at ¶ 95.

⁷⁸ See id. at ¶ 96.

⁷⁹ See id. at ¶ 102.

⁸⁰ See id. at ¶ 108.

If there ever were a Commission policy, the benefits of which are empirically and undeniably verifiable, it is the Commission's prohibition of carrier bundling of information services and transmission services. In the years since bundling was prohibited, consumers have benefitted from the proliferation of new, innovative and competitively priced information services. By separating the provisioning of transmission services from competitively provided information services, the Commission's rules have fueled the development of abundant information services from which consumers are able to choose. From a consumer's perspective, the Commission's unbundling rule has been an unqualified success.

The BOCs' interexchange operations also should be bound by the Commission's All- Carrier Rule, which requires every carrier to publicly disclose information about its transmission services necessary to allow non-affiliated information service providers to develop offerings that can be used in conjunction with those telecommunications services.⁸¹ BOC entry into the interLATA information services market makes it more important than ever to preserve this successful, pro-competitive requirement.

Finally, the BOCs' information service operations must be required to obtain local exchange service on the same, publicly available, non-discriminatory terms and conditions as non-affiliated information service providers. Whatever conclusions the Commission may draw as to whether an interLATA affiliate is non-dominant, the BOCs will continue to retain dominance over the local exchange services that all information service providers require to offer their services. If the information services marketplace is to remain

⁸¹ See 47 C.F.R. § 68.110(b).

competitive, the Commission must preserve its rules that require BOCs to provide all information service providers with nondiscriminatory access to basic transmission services.

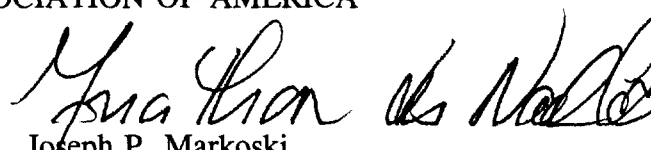
For the foreseeable future, independent information service providers will remain dependent on the BOCs' network services. Although the number of carriers will continue to grow, there will remain only a limited number of facilities-based local exchange networks. With a limited market for the ubiquitous transmission services which information service providers require, there will remain a need for these fundamental competitive safeguards.

XII. CONCLUSION

For all of the reasons set forth above, ITAA urges the Commission to implement Section 272 so as to achieve the pro-competitive, pro-consumer goals of Congress with respect to the information services marketplace.

Respectfully submitted,

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